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ALEXANDER L. STEVAS.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

SOWA & SONS, INC.

Petitioner

vs.

AMERICAN HOIST & DERRICK CO.

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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57 + 3 Foldouts



(i)

QUESTIONS PRESENTED

1. Whether as to non-patent issues the Court of Appeals for the Federal Circuit is required to apply the law of the regional circuit court of appeals in which a case was tried.

2. Whether the Court of Appeals for the Federal Circuit has construed 35 USC §282 (the statutory presumption of validity accorded an issued patent) in a manner which conflicts with Art. I, Sec 8 of the Constitution.

3. Whether it is an abridgement of the right to a jury trial for the Court of Appeals for the Federal Circuit in a patent case (a) to mandate that only special interrogatories (as opposed to a general verdict form) be employed to determine the issue of the obviousness of the patented subject matter, and (b) to

(ii)

require that the jury find only preliminary rather than ultimate facts with respect to the issue of fraud on the Patent and Trademark Office.

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CITATION TO OPINIONS BELOW

American Hoist & Derrick Co. v. Sowa &
Sons, Inc., 725 F2d 1350
(Fed Cir 1984)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO.

SOWA & SONS, INC.

Petitioner

vs.

AMERICAN HOIST & DERRICK CO.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner - Sowa & Sons, Inc.

("Sowa") prays that a Writ of Certiorari
issue to review the judgment of the
United States Court of Appeals for the
Federal Circuit entered in this case on
January 12, 1984.

PROCEEDINGS BELOW

This case commenced in 1979 with
the filing of an action by respondent

American Hoist & Derrick Co. ("AmHoist") against petitioner Sowa in the United States District Court for the District of Oregon for infringement of AmHoist's U.S. Patent No. 4,079,584 ("the Shahan patent")¹, jurisdiction being founded on 28 USC §1338(a). In an amended answer Sowa counterclaimed for a declaration of invalidity of the patent on the bases of obviousness and fraud on the Patent and Trademark Office ("PTO") and for violation of the antitrust laws and unfair competition as a result of AmHoist's

¹A copy of the Shahan patent, issued March 21, 1978 for a "Heavy Duty Shackle," is attached hereto as Appendix A. The Shahan patent is a simple mechanical patent directed to a U-shaped shackle with a wide bow (or central portion) for use in heavy construction and marine applications. Models of the patented shackle structure and of examples of pertinent prior art items were submitted as trial exhibit 173, a photograph of which is attached hereto as Appendix B.

enforcement of a fraudulently procured patent. Jurisdiction of the counter-claims was founded on 28 USC §§1337, 1338(a) and (b), 2201, 2202 and 15 USC §§15 and 22. Both parties made timely demand for jury trial.

At the conclusion of the trial, at which infringement of the patent was conceded, the jury rendered a verdict finding all three of the patent claims in suit invalid for obviousness of the subject matter under 35 USC §103 and for fraud on the PTO (Appendix C). In three separate opinions (Appendices D-F) the lower court held the patent invalid, awarded attorney's fees to Sowa under the "exceptional case" provisions of 35 USC §285 and dismissed Sowa's counter-claims for antitrust violation and for unfair competition. Judgment was entered

on October 19, 1982 (Appendix G).

Both parties appealed to the Court of Appeals for the Federal Circuit. The appeals were thereafter consolidated for briefing and argument. On January 12, 1984 the Federal Circuit reversed the dismissal of Sowa's counterclaims for attempted monopolization under 15 USC §2 and for unfair competition based on AmHoist's enforcement of its fraudulently procured patent. It also reversed the lower court's determination that the Shahan patent was invalid, vacated the award of attorney's fees and remanded for a new trial in conformity with the rulings set forth in its opinion. 715 F2d 1350, 1352 and 1356.

On February 15, 1984 the Federal Circuit denied Sowa's petition for rehearing (Appendix H).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was made final by the denial of Sowa's petition for rehearing. Jurisdiction of this Court is invoked under 28 USC §1254(1) and Rule 17.1 of the Rules of this Court.

APPLICABLE LAWS

Art. I., Sec. 8 of the United States Constitution provides in pertinent part:

The Congress shall have Power.... [8] To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

28 USC §1295 provides in pertinent part:

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--
(1) of an appeal from a final decision of a district court of the United States...if the jurisdiction of that court was

based, in whole or in part, on
§1338 of this title....

35 USC §103 provides in pertinent part:

A patent may not be obtained...
if the differences between the
subject matter sought to be
patented and the prior art are
such that the subject matter as
a whole would have been obvious
at the time the invention was
made to a person having ordinary
skill in the art to which said
subject matter pertains.

35 USC §282 provides in pertinent part:

A patent shall be presumed
valid. Each claim of a patent...
shall be presumed valid.... The
burden of establishing invalidity
of a patent or any claim thereof
shall rest on the party asserting
such invalidity.

STATEMENT OF THE CASE

At the conclusion of the trial on
AmHoist's patent infringement claim the
jury was instructed, inter alia, that:

If you find the prior art
references which defendant has
cited are no more pertinent than
the art utilized by the examiner
when examining the Shahan patent

then defendant has the burden of establishing obviousness by "clear and convincing evidence." If, on the other hand, you find any of the prior art references which defendant has cited are more pertinent than the art utilized by the examiner when examining the Shahan patent, then that presumption of validity disappears as to that issue of obviousness and the plaintiff has the burden of proof by a preponderance of the evidence.

The jury was also instructed as to the several factual inquiries required by Graham v. John Deere, 383 US 1 (1966), in connection with the obviousness issue. (Reporter's transcript at 653-654.)

Thereafter the jury entered a verdict (Appendix C) in which it found all three of the patent claims in suit to be invalid for obviousness under 35 USC §103 and for fraud on the PTO. Specifically, it found each claim invalid because:

- a. The subject matter of the claim would have been

obvious to one of ordinary skill in the art at the time the claimed invention was made.

and

- b. Plaintiff committed fraud on the Patent Office in connection with the claim.

Based on the jury's verdict, the district court, treating the ultimate issue of obviousness as a legal question to be decided by the court, held the Shahan patent invalid under §103 and determined that there was sufficient evidence upon which the jury could have relied in finding that the patent was obtained by fraud:

The jury determined that the subject matter of the Shahan patent would have been obvious to one of ordinary skill in the art at the time of the claimed invention. I agree. [Appendix E, p 4.]

....

Because the issue of obviousness under 35 USC §103 is one of law rather than of fact, it is incumbent [sic] upon the court rather than the jury to make the final determination. Guided by the jury's findings and by the evidence, I hold the Shahan patent to be invalid under §103. [Appendix E, p 2.]

....

A jury determined that AmHoist's patent was invalid. On each claim of the patent in issue, the jury determined that AmHoist committed fraud on the Patent Office. [Appendix D, p 5.]

....

A jury properly concluded that AmHoist committed fraud on the Patent Office. [Appendix D, p 6.]

With respect to Sowa's counterclaims for unfair competition and violation of the antitrust laws, the district court, in granting summary judgment to AmHoist, held that the proof offered by Sowa

would be insufficient to establish the requisite degree of materiality of fraud and dismissed the counterclaims.

On appeal, the Federal Circuit, in vacating the trial court judgment and remanding for a new trial, set forth the following holdings, review of which is herein requested:

1. On retrial Sowa may offer proof on its antitrust and unfair counterclaims but, with respect to the claim for violation of 15 USC §2 (attempted monopolization), Sowa is required to establish "relevant market" as one of the elements of the claim. In the Ninth Circuit Court of Appeals "relevant market" is not a necessary element of an attempted monopolization claim.

2. It is reversible error to instruct a jury: (a) that the presumption

of patent validity may be dissipated by a showing that the PTO did not have before it the most relevant prior art when it considered and granted the patent, and (b) that the burden of proof as to the issue of patent validity can never be placed upon the patentee.

3. (a) It was error to submit the factual issues underlying the 35 USC §103 obviousness question to the jury in the form of a general verdict, and (b) as to fraud, the jury may only determine the state of mind of the patent applicant and the "pertinence" of the alleged fraud but may not make the ultimate determination as to whether or not the patent was obtained by fraud.

REASONS FOR GRANTING THE WRIT

1. This Court should grant the writ in order to resolve the conflict (and

innumerable potential conflicts) created by the Federal Circuit's decision to develop and apply its own body of law as to non-patent issues heard under its ancillary jurisdiction. Such conflicts could be avoided by requiring the Federal Circuit to apply the interpretation of law recognized by the regional court of appeals for the circuit in which the trial court is located. Furthermore, review by this Court is necessary in order to resolve the irreconcilable conflict between the holding of the Federal Circuit pronounced in this case and the long-established rule of the Ninth Circuit Court of Appeals as to the necessity or not of establishing "relevant market" as an element of a party's attempted monopolization claim under §2 of the Sherman Act.

2. This Court should grant the writ in order to resolve an important question of federal law--namely, whether the presumption of validity and burden of proof as construed by the Federal Circuit conflict with the constitutional standard of invention as that standard is set out in Graham v. John Deere, supra.

3. This Court should grant the writ in order to exercise a supervisory function over the decisions of the Federal Circuit relating to the role of juries since jury issues are new to that court, its predecessor courts having had no jurisdiction to review cases in which judgment would have been entered upon jury verdicts. The Federal Circuit opinion in the instant case limits the role of the jury to that of a master and refuses to recognize the long-established

principle that all necessary underlying factual determinations may be, and ordinarily are, inferred from the jury's general verdict.

The foregoing reasons for granting the writ are discussed under separate headings below.

1. Law to be Applied by
the Federal Circuit
to Non-Patent Issues

Under 28 USC §1295 the new court has exclusive jurisdiction over all cases in which the district court's jurisdiction was based "in whole or in part" on 28 USC §1338. Consequently, where a patent is involved and jurisdiction on that ground is alleged, despite the fact that the case may involve causes of action unrelated to the patent, the Federal Circuit will hear and decide appeals relating to those issues. Were that court to develop

its own interpretation of law for the myriad of issues with which it will be confronted, district courts across the country will be required, should a patent be involved, to elect at their peril to follow the law of the regional circuit of which they are a part or the law of the Federal Circuit, without knowing until the conclusion of the trial and the filing of the appeal by which court of appeals the conduct of the trial will be judged². The instant case is a good example of the difficulties which will be encountered by the district courts in

²Despite language in the statute giving the Federal Circuit exclusive jurisdiction over cases in which jurisdiction is based "in whole or in part" on 28 USC 1338, the legislative history of the Federal Courts Improvement Act suggests that "mere joinder of a patent claim in a case whose gravamen is antitrust should not be permitted to avail a plaintiff of the jurisdiction of the Federal Circuit in avoidance of the

trying to apply the law as interpreted by two separate courts of appeal. Here the Oregon district court applied long-recognized principles of law in the Ninth Circuit Court of Appeals on both patent and non-patent issues (there having been no Court of Appeals for the Federal Circuit at the time the case was tried), only to be reversed on all counts and required on retrial to apply the new court's interpretation of the law on both patent and non-patent issues.

The Court of Appeals for the Federal Circuit was "created and chartered with the hope and intent that stability and

²(Cont.)

traditional jurisdiction and governing legal interpretations of a regional court of appeals." Senate Committee on the Judiciary, Report No. 97-275, November 18, 1981. Appeal to a regional circuit in a case having a patent aspect does not, therefore, appear to be wholly foreclosed by 28 USC §1295.

uniformity would be achieved in all fields of law within its substantive jurisdiction," Smith Corp. v. United States, 690 F2d 1368, 1369 (Fed Cir 1982). Such uniformity with respect to patent law may well be desirable and attainable through the consolidation of all appellate jurisdiction over patent cases in the Federal Circuit (although, as indicated below, the new Court in its zeal for uniformity must not be allowed to rewrite the law or disregard the constitutional limitations on patent rights). With respect to issues heard by the Federal Circuit under its pendant jurisdiction, however, it should be required to apply the law of the respective geographic circuits. The congressional history of the legislation which created the Federal Circuit reveals that Congress

was particularly concerned that the function of the new court be to resolve conflict between the circuits, not create it. As indicated in the report of the Senate Committee on the Judiciary on the Federal Courts Improvement Act of 1981, Report No. 97-275, Nov. 18, 1981:

The Committee is concerned that the exclusive jurisdiction over patent claims of the new Federal Circuit not be manipulated. This measure is intended to alleviate the serious problems of forum shopping among the regional courts of appeals on patent claims by investing exclusive jurisdiction in one court of appeals. It is not intended to create forum shopping opportunities between the Federal Circuit and the regional court of appeals on other claims. [Emphasis added]

In the instant case, a three-judge panel of the Federal Circuit, without ever weighing the countervailing policies in favor of its respective choices, elected to "hold" that, in cases appealed

to the Federal Circuit, proof of "relevant market" would be required as an element of §2 Sherman Act attempted monopolization claims despite the fact that the Ninth Circuit Court of Appeals has unambiguously and repeatedly held that "relevant market" is not a necessary element of such violations. (The Federal Circuit panel's opinion suggests that the Ninth Circuit rule is not clear but ignores the unequivocal statements of that court in the following cases, all of which were cited in petitioner's briefs to that court: Northrop Corp. v. McDonnell Douglas Corp., 705 F2d 1030, 1059 (9th Cir 1983); M.A.P. Oil Co., Inc. v. Texaco, Inc., 691 F2d 1303, 1308 (9th Cir 1982); William Inglis, Etc. v. Continental Baking Co., 668 F2d 1014, 1028 (9th Cir 1981).

This is a matter in urgent need of consideration by this Court since it affects the relationship between the new Federal Circuit and the other circuit courts of appeals and since district court judges in pending actions throughout the country will not be able to apply the long-established law of their own circuits in non-patent areas without concern that a directly contrary rule might be enunciated by the Federal Circuit on appeal.

Unless the new court is required to apply the substantive law (with respect to non-patent issues) of the circuit in which the case was tried (in the same way that the federal courts have been required to apply state substantive law to non-federal claims since Erie R. Co. v. Tompkins, 304 US 64 (1938)), it will

create more conflict than it resolves and will be required to establish precedent on issues completely outside its area of particular expertise. Within a single jurisdiction, a litigant's substantive rights in non-patent areas may well differ depending upon whether or not a patent is involved. Congress clearly did not intend that this should be the result of the legislation creating the new court.

2. The Presumption of Patent
Validity as Interpreted by
the Federal Circuit Conflicts
With the Constitutional
Standard of Invention

It is crucial for this Court, early in the history of the new Federal Circuit, to enforce the constitutional limitations on the new court's interpretation of the patent law. While uniformity of decision is a hoped-for

benefit of the creation of the Federal Circuit, the fear remains that it will become a law unto itself should this Court decline to review decisions of the new court which conflict with the Constitution and prior Supreme Court decisions. The new court has from time to time disclosed a certain disrespect for the opinions of this Court³ and, as indicated below, for the Constitution itself.

In AmHoist, the Federal Circuit reversed the lower court's determination of patent invalidity on the ground of obviousness because it said that the jury verdict on which the determination was

³See AmHoist, 725 F2d at 1354-55, where the Federal Circuit refers to the doctrine of "technical fraud" as set forth in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) as an "unfortunate choice of words"; and see discussion of patents as monopolies infra at fn 5, p 28.

based could not stand in light of error in the instructions. The error involved the trial court's treatment of the statutory presumption of validity as set forth in 35 USC §282 and the burden of proof as it affects the validity issue. The trial court (in conformity with the law of the Ninth Circuit Court of Appeals) instructed the jury that, although a patent is presumed valid, if the most pertinent prior art was not before the PTO examiner at the time he or she was considering the patent application, the presumption is dissipated. The presumption being dissipated, the burden of proof is then on the patentee to establish the validity of the patent.

Most of the other circuits have recognized a similar effect on the §282 presumption which, as originally enacted

as part of the Patent Act of 1952, was merely a declaration of existing law (Revisor's Note to §282, Patent Act of 1952). Penn International Industries v. New World Manufacturing, Inc., 691 F2d 1297, 1300 (9th Cir 1982); Black & Decker Manufacturing Co. v. Ever-Ready Appliance Manufacturing Co., 684 F2d 546, 548 (8th Cir 1982); Republic Industries, Inc. v. Schlage Co., 592 F2d 963, 972 (7th Cir 1979); Reed Tool Co. v. Dresser Industries, Inc., 672 F2d 523, 526 (5th Cir 1982); Warner-Jenkinson Co. v. Allied Chemical Corp., 477 F Supp 371, 382 (SD NY 1979), aff'd, 633 F2d 208 (2d Cir 1980); Turzillo v. P. & Z. Mergentine, 532 F2d 1393 (DC Cir 1976).

The Federal Circuit, however, has construed the section in such a way as to put an intolerable burden on the party

challenging the patent and, consequently, the new court's rule conflicts with the constitutional standard of invention. While the Federal Circuit has called the constitutional standard of invention a mere "cliche"⁴ which it rejects, this Court recognized and articulated that standard in unambiguous language:

At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of * * * useful Arts, by securing for limited Times to * * * Inventors the exclusive Right to their * * * Discoveries * * *." Art. I, §8. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the Sixteenth and Seventeenth Centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices--eventually

⁴Union Carbide Corp. v. American Can Co., 724 F2d 1367, 1374 fn 17 (Fed Cir 1984).

curtailed by the Statute of Monopolies--of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. See Meinhardt, *Inventions, Patents and Monopoly*, pp. 30-35 (London, 1946). The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of * * * useful Arts." This is the standard expressed in the Constitution and it may not be ignored. And it is in this light that patent "validity requires reference to a standard written into the Constitution." A. & P. Tea Co. v. Supermarket Corp., supra, at 154.

Graham v. John Deere, 383 U.S. at 5-6.

While no issue relating to the presumption of validity was specifically addressed by the Court in Graham, it should be noted that in that case the lower court had applied the same rule applied by the trial court in the instant case--namely, that the presumption of validity is dissipated by a showing that the most pertinent prior art was not before the examiner at the time of examination of the patent application. In its decision this Court upheld a judgment of patent invalidity against a patentee who had not been accorded the benefit of a never-dissipatable presumption of validity, such as is now required by the Federal Circuit.

To presume a patent valid and require the party alleging invalidity to

prove the same by clear and convincing evidence, even after such party has established that the PTO did not have before it the information necessary to determine patentability, is to so strengthen the hand of the patent monopoly owner⁵ as to emasculate the constitutional standard of invention.

⁵The Federal Circuit has also expressed disapproval of this Court's characterization of patent law as an "exception" to the antitrust law and of patents as "legal monopolies." AmHoist 725 F2d at 1367. This Court stated in Precision Instrument Mfg. Co. v. Automotive Maintenance Co., 324 US 806, 186 (1945):

A patent by its very nature is affected with a public interest.(I)t is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies...are kept within their legitimate scope.
[Emphasis added.]

3. Federal Circuit has Limited the Right to Jury Trials in Patent Cases

Possibly the most important area in which this Court will be required to maintain vigilant watch over the decisions of the Federal Circuit is in the area of the right to a jury trial and the limits which may be placed on the function of a jury in patent related cases. This is so because of the relative lack of experience of the Federal Circuit's

⁵(Cont.)

In Walker Process, Inc. v. Food Machinery Co., 382 US at 177, the Court stated:

Walker's counterclaim alleged that Food Machinery obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office. Proof of this assertion would be sufficient to strip Food Machinery of its exemption from the antitrust laws. [Emphasis added.]

See lengthy discussion of the "patent monopoly" in Graham v. John Deere, 383 U.S. at 5-10.

predecessor courts and its judges with juries, most of the cases which they previously heard having been appealed from administrative tribunals. In the instant case the Federal Circuit held that, on retrial, the jury should be permitted only to respond to preliminary factual inquiries as regards obviousness and fraud on the PTO.

With respect to obviousness, the obviousness or non-obviousness of an invention has been recognized by the great majority of the circuits⁶ as a

⁶Julie Research Laboratories, Inc. v. Guideline Instruments, Inc., 501 F2d 1131, 1135-36 (2 Cir 1974); Systematic Tool & Mach. Co. v. Walter Kidde & Co., 555 F2d 342 (3 Cir 1977); Kabushiki Kaisha Audio-Technica v. Atlantis Sound, Inc., 629 F2d 978 (4 Cir 1980); Swofford v. B & W, Inc., 395 F2d 362 (5 Cir 1968); Nickola v. Peterson, 580 F2d 898 (6 Cir 1978); Dual Mfg & Engineering v. Burris Indus., 619 F2d 660 (7 Cir 1980); Flour City Architectural Metals v. Alpana

question of law based, however, on subsidiary factual issues which were clearly set forth in this Court's opinion in Graham v. John Deere. While Sowa does not dispute the legal nature of the obviousness question, nevertheless, if a jury has been properly instructed in the factual requirements set forth in Graham,

⁶(cont.)

Aluminum Products, Inc., 454 F2d 98 (8 Cir 1971); Del Mar Engineering Lab. v. Physio-Tronics, Inc., 642 F2d 1167, 1172 (9 Cir 1981); Norfin, Inc. v. International Business Mach. Corp., 625 F2d 357, 364-65 (10 Cir 1980); but compare: Manufacturing Research Corp. v. Graybar Electric Co., 679 F2d 1355 (11th Cir 1982) Corning Glass Works v. Brenner, 470 F2d 410, 412-13 (DC Cir 1972). The former Court of Custom and Patent Appeals and Court of Claims have both held that obviousness is a question of law freely reviewable on appeal. See Stevenson v. International Trade Comm., 612 F2d 546 (CCPA 1979); Del Mar Engineering Laboratories, 524 F2d 1178 (Ct Cl Trial Div 1975), aff'd, 525 F2d 1367 (Ct Cl 1975); The First Circuit's rule is contra, Koppers Co. v. Foster Grant, 396 F2d 370 (1 Cir 1968).

its "finding" of obviousness is an entirely proper method of articulating its findings on the underlying issues. While special interrogatories may be more useful to appellate courts than general verdicts and for that reason may be preferred, nevertheless, to hold that it was error to use a general verdict in the instant case is to unnecessarily confine the jury to the role of preliminary factfinder. It has been held repeatedly by the geographic circuit courts that patent cases are not different from other cases in this regard and that a jury may make ultimate factual findings on which legal conclusions are then based. E.g.

Hammerquist v. Clarke's Sheet Metal, Inc., 658 F2d 1319, 1322 (9th Cir 1981), remanded sub nom Sarkisian v. Winn-Proof Corp., 688 F2d 647 (9th Cir 1982), aff'd,

697 F2d 1313 (9th Cir 1983); Tights, Inc. v. Acme-McCrary Corp., 541 F2d 1047, 1060-61 (4th Cir 1976); Panther Pumps & Equipment Co., Inc., v. Hydro-Craft, Inc., 468 F2d 115, 227-28 (7th Cir 1972), cert den, 411 U.S. 965 (1973).⁷

⁷The Federal Circuit itself, in another case, has recognized that general verdicts are an appropriate means of articulating factual findings:

When and if Rules 49, 50, and 51, Fed. R. Civ. P., are repealed, there may be room for the restriction of juries to a fact-finding role and for prohibition of general verdicts in patent or other types of jury trials. Until that day, a prohibition of general verdicts (and disregard of the findings and legal conclusions a jury must make in reaching those verdicts) cannot be accomplished by judicial fiat.

....

Thus it is neither error nor dangerous to justice to submit legal issues to juries, the submission being accompanied by appropriate instructions on the

With respect to Sowa's allegation that the Shahan patent is invalid as a result of fraud committed by the applicant in obtaining the patent, the Federal Circuit has held that the trial court should have submitted the materiality and intent aspects of the fraud issue to the jury separately, again as preliminary factual determinations which the court would then consider in deciding the

⁷(Cont.)

law from the trial judge.
[Emphasis deleted.]

Railroad Dynamics, Inc. v. A. Stucki Co.,
F2d _____, (Fed Cir, Appeal
Nos. 83-951/961, pp 16-17, slip opinion
dated January 25, 1984, as amended
January 31, 1984.)

"legal" issue of fraud⁸. To relegate the jury to the role of preliminary fact-finder on an issue such as fraud is to deprive the parties of their right to a jury trial on the issue. The Federal Circuit mistakes its own lack of definition of the constituent elements of the fraud defense for a complicated "legal" issue which it presumes the jury is incapable of resolving. The mere fact that fraud includes elements of intent and materiality which must be balanced with one another does not preclude it from jury consideration nor render it a legal

⁸Other circuit courts have treated fraud as a factual issue. Edward Valves, Inc., v. Cameron Iron Works, Inc., 286 F2d 933, 947-48 (5th Cir 1961), ("Fraud is a question of fact"); International Telephone & Telegraph Company v. Raychem Corp., 538 F2d 453, 461 (1st Cir 1976); Cf. American Original Corp. v. Jenkins Food Corp., 696 F2d 1053, 1060-61 (4th Cir 1982), DeLong Corp. v. Raymond Int'l, Inc., 622 F2d 1135 (3rd Cir 1980).

question. But in AmHoist the Federal Circuit would require the jury to determine the pertinency of the fraud as an independent element presumably on a scale ranging from "unrelated" to "outcome determinative." With respect to intent, the jury would similarly have to quantify the degree of purposefulness of the patentee's conduct. But on the other hand it would be barred from balancing the two elements to determine whether the patent was obtained by "fraud." The court's effort to segregate the functions of identifying and weighing the constituent elements of fraud is unprecedented.⁹

⁹As the Federal Circuit pointed out in Railroad Dynamics, Inc. v. A. Stucki Co., supra, ____ F2d at ____ (p 17, slip opinion), "The comparatively recent resurfacing of jury trials in patent cases, though productive of discomfort for some judges and commentators, may or may not be wise or welcome; it forms no

As the Federal Circuit has itself recognized, Connell v. Sears, Roebuck & Co., 722 F2d 1542, 1547 (Fed Cir 1983), ultimate facts such as negligence in personal injury cases are submitted routinely to juries despite the fact that negligence, like obviousness (or fraud), includes multiple preliminary facts which must be determined and weighed prior to the issuance of a verdict.

Lest the patent law and the new court come to represent an entirely separate legal system outside the system comprising the geographic circuit courts supervised by this Court, Sowa urges that the Federal Circuit not be permitted to

⁹(Cont.)

basis for creation of special and unauthorized rules, or for the consequent risk of effectively denying the constitutional right spelled out in the first clause of the Seventh Amendment."

diminish the right to jury trial in its fullest sense simply because one's grievance relates to a patent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel	Attorney for Petitioner
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May 1984

APPENDIX A

**United States Patent
No. 4,079,584**

United States Patent [19]

4,079,584

[11]

Shahan

Mar. 21, 1978

[54] HEAVY DUTY SHACKLE

[75] Inventor: James B. Shahan, Tulsa, Okla.

[73] Assignee: American Hotel & Derrick Company,
Tulsa, Okla.

[21] Appl. No.: 739,056

[22] Filed: Nov. 5, 1976

[51] Int. Cl.² B21L 13/00; F16G 15/06
[52] U.S. Cl. 59/35 R; 59/86
[58] Field of Search 59/86, 35, 93;
24/201 LP; 114/114

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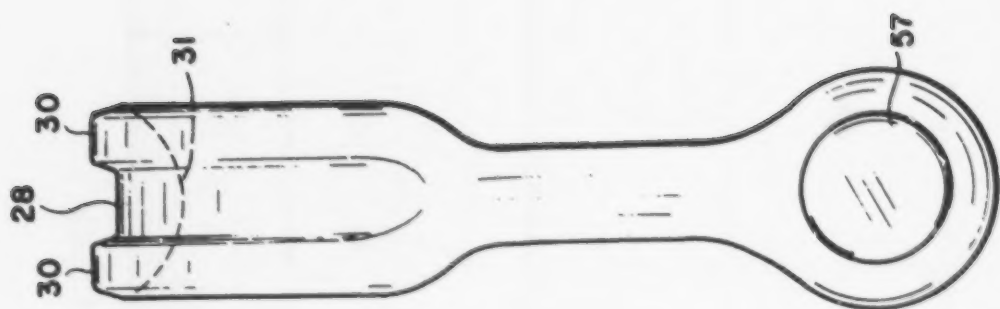
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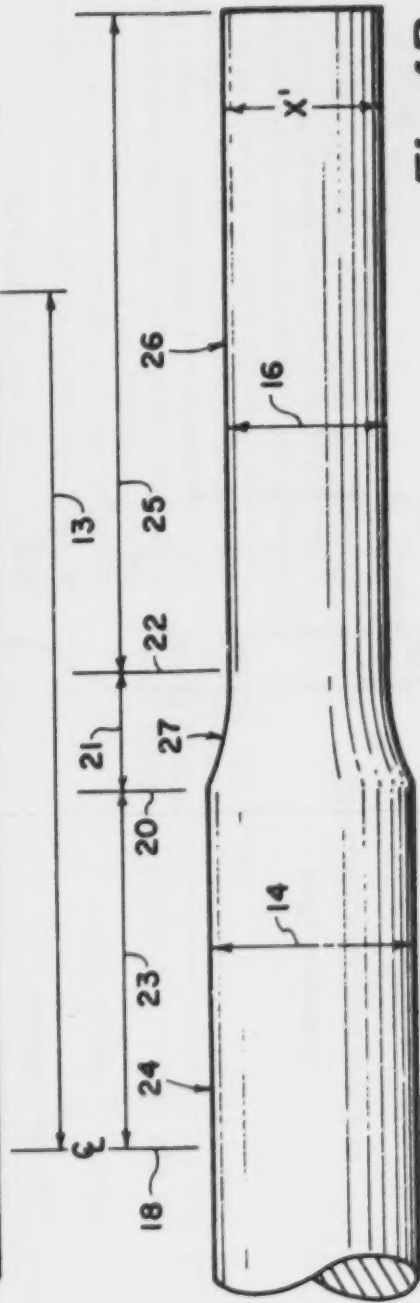
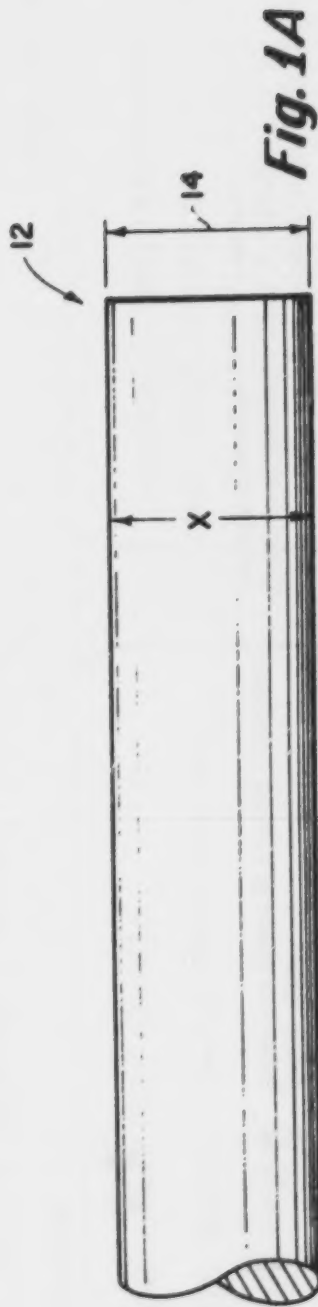
Primary Examiner—C.W. Lanham
Assistant Examiner—Gene P. Crosby
Attorney, Agent, or Firm—Head, Johnson & Chafin

[57] ABSTRACT

A heavy duty shackle for use under great loads, such as in anchor lines. The shackle is formed from a cylindrical bar rod by shaping the ends to a reduced diameter, and forging the central portion into a flattened shape having the cross-section of a wide shallow U shape. The bottom surface of the central section is in the form of a portion of a circular cylinder. The ends of the bar are flattened and a central opening is forged and based for a pin. The formed bar is then bent in the form of a bow to provide an eye for the shackle, with two parallel ears spaced a selected distance apart.

7 Claims, 8 Drawing Figures





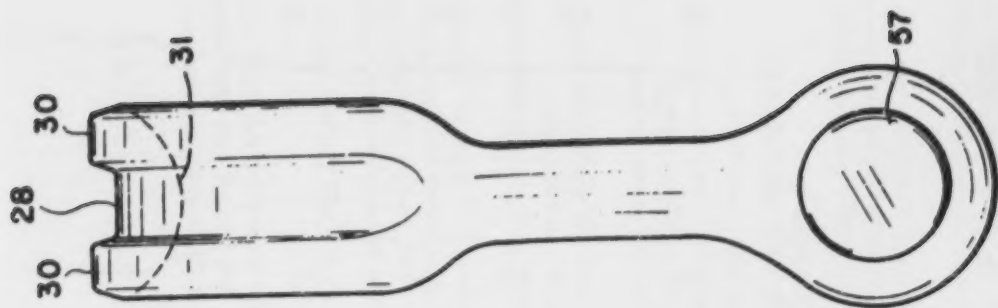


Fig. 6

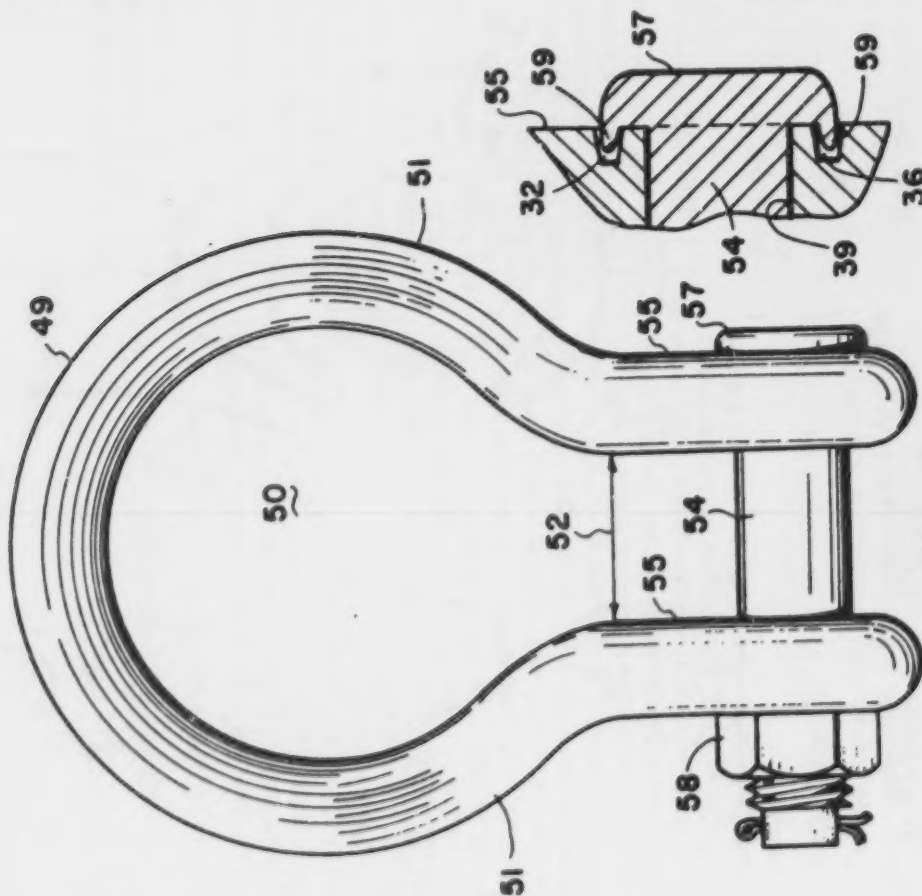
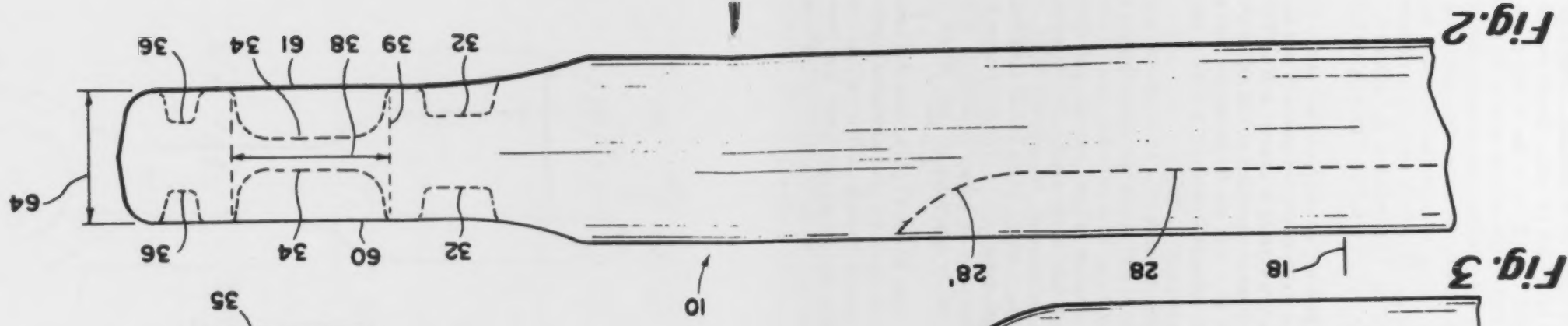
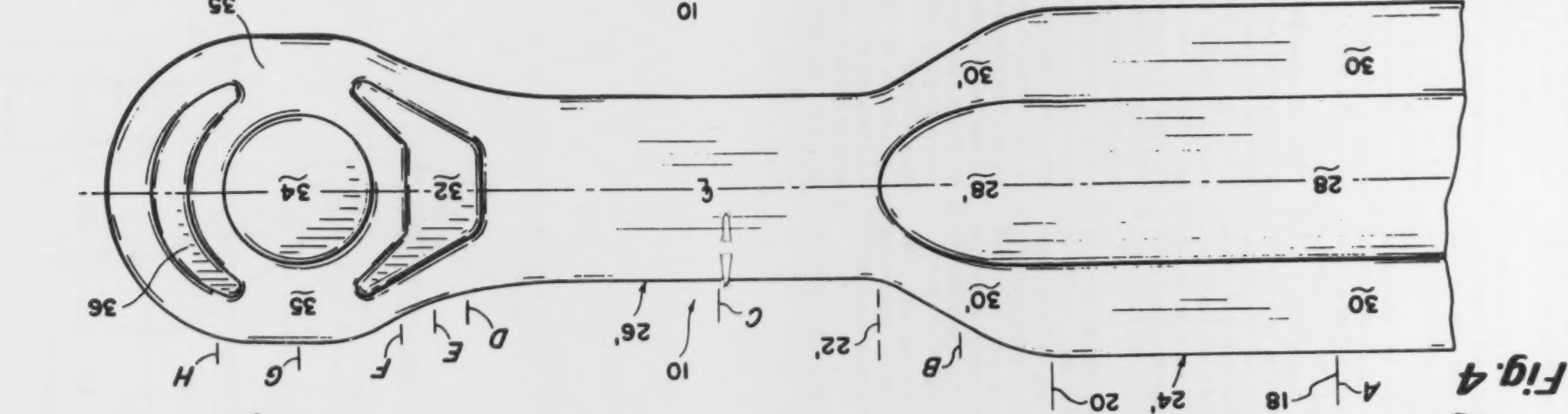
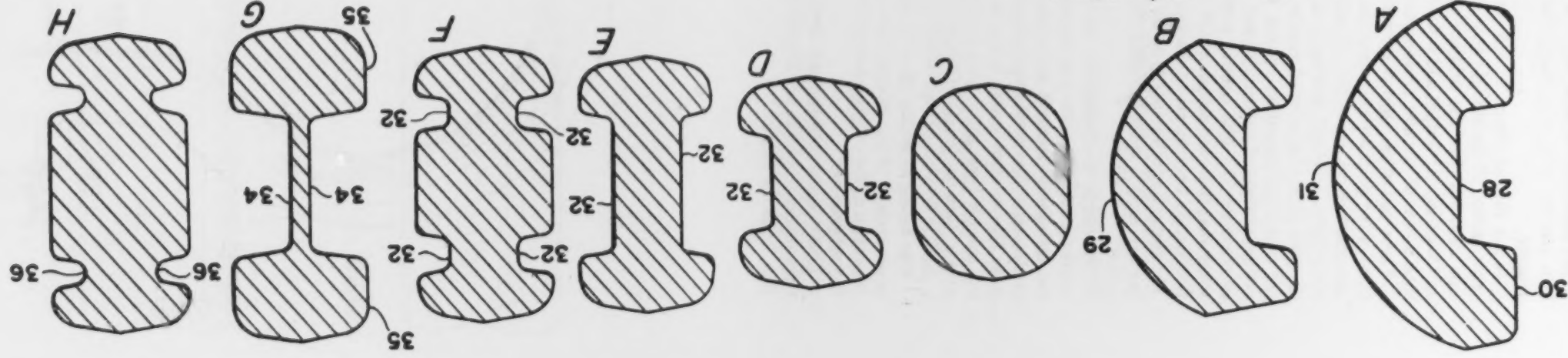


Fig. 5A

Fig. 5



HEAVY DUTY SHACKLE

BACKGROUND OF THE INVENTION

This invention lies in the field of heavy duty cable fittings. More particularly, it concerns the design of a very heavy duty shackle, such as would be used in an anchoring system, and subjected to forces of several hundred tons or more.

In the prior art, shackles in the form of a U shape, with pins which pass through openings in the ears, have been constructed of round bar stock, which is flattened on the ends, drilled for a pin, and then bent into a U shape. Such shackle bows having a round cross-section are unsatisfactory, since they provide a very small radius around which a heavy wire rope must bend when in use. With small size wire ropes, a thimble is often used, which will provide a surface of greater radius, to support the wire rope and utilize the full strength in the wire rope. However, for very heavy loads a thimble is not practical, and there is consequently a weakness in the use of a heavy wire rope when bent around a small radius shackle.

SUMMARY OF THE INVENTION

It is a primary object of this invention to provide a heavy duty shackle bow which has a cross-section, the inner surface of which is in the shape of a part of a cylinder, which has a radius greater than the radius of the round bar from which it is fabricated.

It is a further object of this invention to provide a cross-section for the bow of a heavy duty shackle, which provides a greater length of contact between the bow and the wire rope looped through the eye of the shackle.

It is a further object of this invention to provide a cross-section of the shackle bow that has a greater section modulus than the original circular cross-section, and has a lighter weight and provides a greater strength than a bow of circular cross-section.

These and other objects are realized, and the limitations of the prior art are overcome in this invention, by manufacturing a heavy duty shackle bow from a round rod of selected length and diameter D, by first fullering the two ends to a selected smaller diameter D'. There are two short transition conical sections between the central portion of diameter D and the two end portions of diameter D'. The central portion is forged into a somewhat flattened shape which has a cylindrical surface on the bottom, and a shallow U shape on the top. The shape is much wider than the diameter D and has a greater section modulus than the original cylindrical shape.

The shape is substantially of constant thickness of cross-section, so that in heat treatment the properties of the metal will be much more uniform than where the thickness of the metal varies throughout the cross-section. The contact length between the inner surface of the shackle bow and a wire rope connected thereto, is greater than the length of contact of the inner surface of a shackle bow made out of round stock.

The radius to which the wire rope is bent around the inner surface of the shackle bow is much greater than the radius of the original bar and is at least twice that of the original bar.

The two fullered ends of the rod are flattened and broadened, and holes are forged and drilled for the pin that locks the shackle.

The forged bar is then bent in the form of a bow with a more or less circular eye, and having two ears which are spaced apart a selected distance for entry of the wire rope loop.

BRIEF DESCRIPTION OF THE DRAWINGS

These and other objects and advantages of this invention and a better understanding of the principles and details of the invention will be evident from the following description taken in conjunction with the appended drawings in which:

FIGS. 1A and 1B represent views of the original bar rod and the bar after fullering, respectively.

FIGS. 2 and 3 illustrate plan and elevational views of the forged rod.

FIG. 4 illustrates the various cross-sections of the forged rod at selected points along its length.

FIGS. 5, 5A and 6 show two views of the completed shackle, and a detail of the pin.

DESCRIPTION OF THE PREFERRED EMBODIMENT

Referring now to the drawings there is shown in FIG. 1A a view of a cylindrical rod of selected half length 13 and diameter 14 or X indicated generally by the numeral 12.

FIG. 1B shows the shape of the rod after fullering, in which the diameter of the ends has been reduced from the original diameter 14 to a lesser diameter 16 or X'. The central portion 24 of the rod now extends from the mid-point a distance 23 at the original diameter 14. There is then a short portion 27 of more or less conical transitional shape, for a length 21, to a plane 22, and then a portion 26 of length 25 of constant diameter 16.

The fullered rod 26 of FIG. 1B is then forged into the shape shown in FIGS. 2 and 3, and in the various cross-sections shown in FIG. 4. The central portion 24' as at plane 18 is flattened and broadened into a section shown in A of FIG. 4. This has on the underside a cylindrical surface 31, and on the top a flat surface 30 with a depressed central portion 28, which provides a shallow U-shaped cross-section. The radius of the cylindrical portion 31 is at least twice the radius of the original rod 12.

The depression 28 becomes shallower and narrower in the region of the rod between the planes 20 and 22, where the cross-section at plane B is shown as B in FIG. 4. Here the width of the cross-section and its radius are reduced from that of A and the shape merges into a somewhat flattened cylinder shown by C in FIG. 4, and indicated for the portion C of FIG. 3.

The end of the portion 26 of FIG. 1B is flattened and broadened in order to form a portion where there is a central opening for a pin, with sufficient material surrounding the depressions 34 to provide sufficient strength to carry the load of the shackle. In the center of this broadened portion there are depressions 34 on top and bottom surfaces 60, 61 which spread the metal outwardly to provide a thick rim 35. The depressions 34 are of somewhat lesser diameter than the diameter 38 of the opening that will be bored for the pin, shown in dashed lines 39.

In addition, the faces 60 and 61 of the ends that have been flattened to a thickness 64, have additional depressions 32 and 36 in each of the surfaces. The purpose is to thin the cross-section and to provide better heat treatment of the end portions of the shackle. These depressions 32 and 36, which are somewhat arcuate in shape,

have an additional advantage as will be explained, in connection with FIGS. 5 and 6, that when the pin is inserted through the openings 39, that are bored in the ends of the ears, there may be spurs or projections on the inner surface of the head of the pin, which lock into the depressions 32 and/or 36 and lock the pin against rotation.

The next step in the manufacture of the shackle is, of course, to form the forged bar into a loop, which provides, as in FIGS. 5 and 6 an arcuate portion surrounding an eye 50, and rein sections 51 of more or less cylindrical cross-section, leading to the broader and thinner ears 55 of the shackle which are spaced apart by distance 52 less than the diameter of eye 50. When completely bent into shape, the two openings 39 are opposite each other, and a pin 54 can be inserted into the openings 39 in the ears and locked by any selected means, such as, for example, by a threaded nut 58 and/or cotter pin as shown.

In the enlarged section FIG. 5A there is shown a 20 detail of spurs or projections 59 on the head 57 of the pin 54, which lock into the grooves 32 and/or 36.

After the customary shackle is formed, it is then heat treated, as is customary. The change in cross-section is advantageous in providing a more uniform heat treatment, and development of the full strength of the metal E.

What has been described is a method of manufacture and a very heavy duty shackle, which is forged with a specific type of cross-section, from a round bar, which better utilizes the strength of the material, has a greater section modulus, reduces the overall weight of the shackle, increases the line of bearing contact between the wire rope and the shackle, and increases the radius of the contact surface, for better utilization of the intrinsic strength of the wire rope.

By creating a specialized shape with the inner radius the equivalent to the diameter of the basic stock size of the shackle, the contact length of the rope bearing surface has been increased by 58%. This increase in bearing or contact length naturally reduces the relative amount of wear on the wire rope or shackle bow by a corresponding amount.

By doubling the radius of the contacting surface this, in effect, means that the contacting wire rope is not bent around as small a radius and it increases the usable rope strength by a factor of 15%.

By utilizing the special shape section, the section modulus is increased by 36% over what the normally-used round bar section would be.

By using a relatively constant cross-sectional thickness and keeping this dimension the same as the normally-used round bar diameter, better metallurgical properties are achieved in the quenched and tempered material to the extent of 6%.

The overall gain by the utilization of the shape section is an increased strength in the bow section of 42% over the conventionally-used round bar diameter section.

Utilizing the special-shaped section and taking advantage of the beforementioned strength increase in the section, achieves a 30-40% weight reduction over the same capacity shackle utilizing a round bar section of the same nominal configuration dimensions.

While the invention has been described with a certain degree of particularity, it is manifest that many changes may be made in the details of construction and the arrangement of components without departing from the

spirit and scope of this disclosure. It is understood that the invention is not limited to the embodiments set forth herein for purposes of exemplification, but is to be limited only by the scope of the attached claim or claims, including the full range of equivalency to which each element thereof is entitled.

I claim:

1. The method of constructing a heavy duty shackle, for use under large loads, such as with anchors, from a selected length of round bar stock of diameter X, comprising the steps of:
 - a. fullering, or reducing the diameter of the end portions of said bar, to a selected length, to a diameter X';
 - b. forging the center portion of diameter X into a broad flat U section, with the bottom surface of the U a portion of a circular cylinder; wherein the radius of said circular cylinder is at least substantially equal to diameter X' and the transverse cross-section approaches approximately constant thickness;
 - c. forging the ends into a section broader than, and thinner than X';
 - d. forging depressions in the two surfaces of said thinner ends, said depressions approximately arcuate, around a central hub;
 - e. forging central depressions on each surface of said end hubs, of diameter smaller than the diameter of the pin to be used in the shackle;
 - f. bending said central portion into an arc, forming an eye, with the arms of a said U section facing outwardly, and providing two parallel ears, the spacing between said ears less than the diameter of said eye, and greater than the dimension of an object to be looped over said shackle;
 - g. drilling openings through said ends concentric with said central depressions; and
 - h. heat treating said shackle.
2. The method as in claim 1 including the additional steps of:
 - a. providing a pin of diameter less than said opening;
 - b. forming a head at one end of said pin;
 - c. forming at least one spur on said head adapted to fit into one of said arcuate depressions; and
 - d. providing means on the second end of said pin to lock it in the openings in said ears.
3. A shackle bow for heavy duty use under large loads, as in anchor lines, comprising:
 - a. a rein section adjacent the two ends of said shackle for a selected length and of diameter X', each said rein section being between a central cylindrical portion and a flattened ear portion;
 - b. said central cylindrical portion being of a broad-ended flattened shape, having a U-shaped cross-section with a circular bottom surface, the radius of said bottom surface being at least substantially equal to X';
 - c. said shackle being in the shape of a bow, with said U-shape of said central cylindrical portion directed outwardly, around a central eye, said ears being substantially parallel, spaced apart a distance less than the diameter of said eye, and having coaxial central openings therein to receive a pin there-through.
4. The shackle bow as in claim 3 including at least one substantially arcuate depression, substantially concentric with said central opening on the outer surfaces of said ears.

5

5. A shackle bow having an approximately circular eye, with two rein sections leading to two substantially parallel ears;

the cross-section of said bow being in the form of a broad flat U section, with the bottom (inner) surface having as large a radius as possible; the thickness of the cross-section of said bow substantially constant;

the cross-section of said rein section approximately circular;

15

20

25

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35

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55

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6

the cross-section of said ears being broad and thin, with aligned central openings, and thick flanges formed by forging central depressions in said ears; said shackle bow being heat treated.

6. The shackle bow as in claim 5 including at least one substantially arcuate depression substantially concentric with said central opening on the outer surfaces of said ears.

7. The shackle bow of claim 5 including a locked pin

• • • • •

APPENDIX B

Photograph of Trial Exhibit 173

SCHAEFER
HEADBOARD SHACKLE

NICRO-FICO
STRIP SHACKLE

CROSBY LAUGHLIN
BOOM PENDANT CLEVIS

CROSBY WIDE BODY
SLING SHACKLE

SOVIA GUYLINE SLEEVE

SOWA ANCHOR SHACKLE

SOWA BIG RED
SLING SHACKLE



APPENDIX C

Jury Verdict
dated November 13, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HOIST & DERRICK CO.,)	
	)	Civil No.
Plaintiff,	)	79-983-PA
)	
v.)	
)	
SOWA & SONS, INC.,)	
)	
Defendant.)	

VERDICT

1. Do you find that claim 3 of the patent is

Valid . [CHECK ONLY ONE]
Invalid X .

2. If you have found that claim 3 of the patent is invalid, then state the reason or reasons why by checking the applicable item(s) below. [DO NOT ANSWER THIS IF YOU FOUND CLAIM 3 VALID]

a. The subject matter of claim 3 would have been obvious to one of ordinary skill in the

9a

art at the time the claimed
invention was made. X

b. Plaintiff committed fraud on
the Patent Office in connec-
tion with claim 3. X

c. James W. Shahan is not the
inventor of calim 3 and the
patent office was inten-
tionally deceived in this
regard.

3. Do you find that claim 5 of the
patent is

Valid . [CHECK ONLY ONE]
Invalid X .

4. If you have found that claim 5 of
the patent is invalid, then state the
reason or reasons why by checking the
applicable item(s) below. [DO NOT ANSWER
THIS IF YOU FOUND CLAIM 5 VALID]

10a

a. The subject matter of claim 5 would have been obvious to one of ordinary skill in the art at the time the claimed invention was made. X

b. Plaintiff committed fraud on the Patent Office in connection with claim 5. X

5. Do you find that claim 7 of the patent is

Valid .

[CHECK ONLY ONE]

Invalid X .

6. If you have found that claim 7 of the patent is invalid, then state the reason or reasons why by checking the applicable item(s) below. [DO NOT ANSWER THIS IF YOU FOUND CLAIM 7 INVALID]

a. The subject matter of claim 7 would have been obvious to one of ordinary skill in the

11a

art at the time the claimed
invention was made. X

b. Plaintiff committed fraud on
the Patent Office in connec-
tion with claim 7. X

7. Regardless of your previous
answers, what is the amount of the pro-
fits lost by plaintiff, if any, as the
result of defendant's sales of 18 wide-
body shackles?

Damages \$ 0.00 .

Dated the 13 day of November, 1981.

 /S/ William L. Elder
Foreperson



APPENDIX D

Opinion and Order of the Trial Court
dated June 29, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HOIST & DERRICK)	
COMPANY,	)	Civil No.
	)	79-983-PA
Plaintiff,)	
)	
v.)	
)	
SOWA & SONS, INC.,)	
)	
Defendant.)	

OPINION AND ORDER

J. Pierre Kolisch, Esquire
Francine H. Gray, Esquire
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Attorneys for Defendant

PANNER, Judge:

The remaining issue in this patent infringement case is whether defendant is entitled to an award of attorney's fees. A jury found that various claims of AmHoist's "Shahan" patent were invalid. The jury specially found that the subject matter would have been obvious to one of ordinary skill in the art at the time of the claimed invention. The jury concluded that AmHoist committed fraud on the Patent Office in obtaining the patent. I found there to be sufficient evidence to support the jury's findings and accordingly denied plaintiff's motion for judgment notwithstanding the verdict, or alternatively, for a new trial. I further concluded, however, that the degree of fraud was insufficient to support defendant's unfair competition and antitrust claims. I therefore granted plaintiff's

motion for summary judgment on defendant's counterclaims.

I hold that this case is "exceptional" for purposes of an award of attorney's fees and that such an award is appropriate.

DISCUSSION

Congress has provided that courts "in exceptional [patent] cases may award attorney fees to the prevailing party." 35 U.S.C. §285. Congress's intent was not to routinely permit recovery of attorney's fees in patent cases but to allow an award of fees in an extraordinary case to prevent gross injustice. Monolith Portland Midwest v. Kaiser, 407 F.2d 288, 294 (9th Cir. 1969). Even prior to enactment of §285, this circuit cautioned exercise of discretion, concluding that an award of attorney's fees in a patent case should be based

"upon a finding of unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force, which makes it grossly unjust that the winner . . . bear the burden of his own counsel fees"

Park-In-Theatres Inc. v. Perkins, 190 F.2d 137, 142 (9th Cir. 1951).

Here, defendant prevailed on the patent claims. Assuming the case is "exceptional" within the meaning of §285, an award of fees is solely a matter of the court's discretion. E.g., Mayview Corp. v. Rodstein, 620 F.2d 1347, 1357 (9th Cir. 1980); St. Regis Paper Co. v. Royal Industries, 552 F.2d 309, 316 (9th Cir.), cert. denied, 434 U.S. 996 (1977).

Many factors contribute to a finding of "exceptional." E.g., Garbell, Inc. v. Boeing, 546 F.2d 297 (9th Cir. 1976),

cert. denied, 431 U.S. 955 (1977) (bad faith; unreasonable assessment of case; running up expenses); Ashcroft v. Paper Mate Mfg. Co., 434 F.2d 910 (9th Cir. 1970) (willful concealment of interests; unnecessary discovery delay; contempt); Purer & Co. v. Aktiebolaget Addo, 410 F.2d 871 (9th Cir.), cert. denied, 396 U.S. 834 (1969) (fraud; a continuing patent infringement); Monolith Portland Midwest v. Kaiser, supra, (fraud; unduely prolonged litigation). Here, the jury's finding of fraud on the Patent Office is sufficient grounds for finding this case to be exceptional. Contrary to each parties' accusation, I do not find any undue delays or failure to actively pursue the case. Nor do I find any evidence of attorney misconduct, the raising of unnecessary, collateral matters, or

unreasonable refusal by either side to settle the case. While hindsight might indicate that the action should never have been filed, I do not find that the case was brought in bad faith. See Alburger v. Magnaflux Corporation, 444 F.2d 1406 (9th Cir. 1971). Differences of opinion as to patentability usually do not, by themselves, give rise to a finding of "exceptional". Crom Corporation v. Crom, 677 F.2d 48, 51 (9th Cir. 1982).

Fraud on the Patent Office may support a finding of "exceptional" for purposes of §285. In SSP Agricultural v. Orchard-Rite Ltd., 592 F.2d 1096, 1102 (9th Cir. 1979), the court noted that "[b]ad faith, fraud or other significant misconduct 'which would make it grossly unjust for the prevailing party to be left with the burden of his litigation

expenses' is required to make a case 'exceptional,' justifying an award of fees under §285." Citing Garbell, supra. Additionally, the court in W.R. Grace v. Western U.S. Industries, 608 F.2d 1214, 1219 (9th Cir. 1979), cert. denied, 446 F.2d 953 (1980), concluded that "[c]ases involving fraud, . . . or bad faith in dealings with the Patent Office are precisely the 'exceptional' cases for which §285 is designed."

Plaintiff argues that the evidence was insufficient to show wrongfulness, willfulness or bad faith on its part. I implicitly rejected this argument by denying plaintiff's motion for judgment notwithstanding the verdict. Furthermore, several cases hold that conduct short of fraud may support a finding of "exceptional." In Monolith Portland Midwest v.

Kaiser, supra, the court held that an applicant's fraud on the Patent Office was sufficient to convert his later infringement action into an exceptional case within the meaning of §285. The court further noted that "conduct short of fraud and in excess of simple negligence is also an adequate foundation for deciding that a patent action is exceptional." Monolith, supra at 294. Such conduct, the court reasoned, constituted a serious breach of the patentee's duty to the Patent Office. A party who succeeds in invalidating an unlawfully obtained patent performs a valuable public service. An award of attorney's fees rewards such a prevailing party while in the same measure penalizing the wrongdoing patentee. Id.

In Mayview Corporation v. Rodstein, 620 F.2d 1347, 1358 (9th Cir. 1980), the court, relying on Garbell, supra, and Monolith, supra, concluded that "[i]t is true that simple negligence does not constitute an 'exceptional' case and therefore will not support an award of attorney's fees; however, conduct short of fraud and in excess of simple negligence will suffice." The appellate court, unable to determine from the trial court's finding whether patentee's actions rose above simple negligence, remanded for that determination.

In Western Food Equipment Co. v. Foss America, Inc., 205 USPQ 835, 838 (D. Or. 1980), appeal pending, Judge Burns, relying on Monolith, supra, determined that "fraud alone is sufficient to convert the action into an exceptional

case." He also concluded that conduct short of fraud such as a calculated recklessness about the truth which constitutes a serious breach of duty of candor to the Patent Office is sufficient to support a finding of "exceptional."

Western Food, supra at 838.

Plaintiff argues strenuously that Monolith and Western Foods are factually distinguishable. I agree that the wrongful activities described in those two cases were, in some respects, more egregious than in the present case. Nevertheless, I find that the logic and principles invoked in those authorities are persuasive and should be applied to the facts and circumstances here.

A jury determined that AmHoist's patent was invalid. On each claim of the patent in issue, the jury determined that

AmHoist committed fraud on the Patent Office. The fact that a reissue application was allowed by a Patent Office examiner makes this a harder case, but does not remove the finding of fraud by the jury. Similarly, the fact that I found the degree of fraud insufficient under Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172 (1965), to support the defendant's counterclaims, brings this case closer to the line drawn in Monolith and its progeny.

A patent applicant is under a duty to the Patent Office to make full and fair disclosure of all relevant facts which may affect the patentability of the invention. A breach of that duty hinders the Patent Office in performing its function of preventing the issuance of

unlawful patent monopolies. Monolith,
supra at 294, citing Precision Instrument
Manufacturing Co. v. Automotive Mainte-
nance Machinery Co., 324 U.S. 806 (1945).
As in Monolith, the patentee's breach of
duty found here by a jury affects not
only the validity of the patent but also
my determination of whether the case is
exceptional.

I find that plaintiff's actions taken
to procure its Shahan patent were well
within the range of activities sufficient
to find the ensuing patent infringement
case "exceptional" within the meaning of
§285. A jury properly concluded that
AmHoist committed fraud on the Patent
Office. Even assuming that AmHoist's
conduct was short of fraud, I would find
that it was in excess of simple negli-
gence so as to support a finding of

"exceptional."

I further find that an award of attorney's fees in this case is appropriate. Defendant is a smaller company than plaintiff and enjoyed substantially less of the market share. The amount of potential damages for the alleged infringement was small--a factor which might have counseled Sowa to not undertake the expensive defense of this case. Sowa's success in invalidating an unlawfully obtained patent accrues not only to its interests but also to the public interest. Under these circumstances, I find that it would be unjust for Sowa to bear the expense of its counsel's fees in successfully pursuing this case.

Sowa has submitted a partial summary of its attorney's fees. It will be necessary for Sowa to submit a more complete

accounting of its attorney's fees with supporting affidavits. When an action combines patent and nonpatent claims, no award of fees may be made for the non-patent issues. Monolith, supra at 297. Accordingly, Sowa is directed to segregate out those fees associated with non-patent claims such as its counterclaims for unfair competition and antitrust violations.

Defendant shall have twenty (20) days to submit to the court an accounting of attorney's fees. Plaintiff shall have ten (10) days thereafter to respond, after which time I will determine the appropriate amount of fees and enter judgment.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

IT IS SO ORDERED.

DATED this 29 day of June, 1982.

/S/ Owen M. Panner

OWEN M. PANNER

United States District Judge

APPENDIX E

Opinion of the Trial Court
dated August 27, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HOIST & DERRICK)	
COMPANY,)	Civil No.
)	79-983-PA
)	
Plaintiff,)	
)	
v.)	
)	
SOWA & SONS, INC.,)	
)	
)	
Defendant.)	

OPINION

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Francine H. Gray, Esquire
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Attorneys for Defendant

PANNER, J.

In this patent infringement case, a jury found that various claims of American Hoist & Derrick Company's (AmHoist) "Shahan" patent were invalid. The jury specifically found that the subject matter of the patent would have been obvious to one of ordinary skill in the art at the time of the claimed invention.

Because the issue of obviousness under 35 U.S.C. §103 is one of law rather than of fact, it is incumbent upon the court rather than the jury to make the final determination. Guided by the jury's findings and by the evidence, I hold the Shahan patent to be invalid under §103.

FACTS

At issue is plaintiff AmHoist's "Heavy-Duty Shackle" (Shahan) patent. Plaintiff contends that defendant Sowa

and Sons (Sowa) infringed the patent. Sowa admitted the possible infringement but denied that the patent was valid or enforceable.

A shackle is commonly used for fittings or for connecting together ropes, wires, cables, or chains. The Shahan patent was issued for a U-shaped, heavy-duty shackle with a wide body, a widened central bow portion, relatively narrowed rein portions, and flattened ear portions with central openings. The rein portions are approximately circular in cross-section. The radius of the inner surface of the central bow portion is either equal to or greater than the diameter of the rein portion. Sowa argues that the Shahan shackle construction is a combination patent comprised of features or elements that are recognizable in prior art.

DISCUSSION

A patent is presumed to be valid, 35 U.S.C. §282, and the party challenging its validity carries the burden of demonstrating its invalidity. Saf-Guard Products, Inc. v. Service Parts, Inc., 532 F.2d 1266, 1271 (9th Cir. 1976), cert. denied, 429 U.S. 896 (1976). The presumption disappears, however, when challenged on grounds of "obviousness," 35 U.S.C. §103, if it appears that the holder of the patent failed to disclose to the patent office all relevant prior art. Hewlett-Packard Co. v. Tel-Design, Inc., 460 F.2d 625, 628 (9th Cir. 1972). The patent office is dependent upon the applicant's disclosure of all relevant prior art. When an applicant fails to cite relevant prior art, the patent examiner may well remain unaware and lack

the necessary facts to correctly rule upon the patent issuance. When this occurs, the court is not entitled to rely upon the patent office expertise.

The test for obviousness under § 103 is whether differences between the prior art and the claimed invention would have been obvious to a person reasonably familiar with the pertinent art. Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966). Application of the test requires three factual determinations: (1) the scope and content of the prior art; (2) the level of ordinary skill in the pertinent art; and (3) the differences between the prior art and the subject matter of the patent at issue. Id. at 17.

The scope and content of the prior art consists of prior art cited to the patent office and "new" prior art offered

by the defendant. Defendant cited four items of prior art not considered by the patent office: the Crosby-Laughlin boom pendant clevis Model S-420; the Nicro/Fico strip shackle; the Shaefer Marine head-board shackle; and the Sowa guyline sleeve. The first three have widened central bow portions, relatively narrow rein portions, and considerably larger ear portions. All four are designed, however, for relatively light-duty shackle applications.

Several technical experts testified as to the level of ordinary skill in the art of heavy-duty shackle design. It was agreed that a person of ordinary skill in such a field would be a skilled engineer capable of determining stress requirements, material, and shape designs and would have a high familiarity with the

design, manufacturing, and performance characteristics of various types of rope fittings and fixtures. Additionally, such a person would understand the various interactions between ropes and fittings.

The jury determined that the subject matter of the Shahan patent would have been obvious to one of ordinary skill in the art at the time of the claimed invention. I agree. The only difference other than size between the Shahan design and other cited, prior art is the presence of rein portions of either rectangular (Crosby-Laughlin and Nicro/Fico) or ellipsoidal (Schaefer Marine), rather than circular cross-section. Such circular cross-section design is not new, however, and can be found on the old and well-known anchor shackle design.

Accordingly, I adopt the jury's determination that the Shahan patent did not meet the nonobviousness requirement of patentability found in 35 U.S.C. §103.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

DATED this 27 day of August, 1982.

/S/ Owen M. Panner
OWEN M. PANNER
United States District Judge



APPENDIX F

Opinion of the Trial Court
dated October 14, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HOIST & DERRICK)	
COMPANY,)	Civil No.
)	79-983-PA
)	
Plaintiff,)	
)	
v.)	
)	
SOWA & SONS, INC.,)	
)	
Defendant.)	

OPINION AND ORDER

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Attorneys for Defendant

PANNER, J.

In this patent infringement case I have previously adopted the findings of a jury and held that the American Hoist & Derrick Company's (AmHoist) "Shahan" patent was invalid under 35 U.S.C. §103. I also ruled that this case was "exceptional" for purposes of an award of attorney's fees, see 35 U.S.C. §285, and that reasonable fees should be awarded to defendant Sowa & Sons (Sowa) for the work associated with the patent claim. I now hold that the defendant is entitled to reasonable attorney's fees in the amount of \$50,000.00.

BACKGROUND

At issue in this case was plaintiff AmHoist's "Heavy-Duty Shackle," the "Shahan" patent. Plaintiff contended that defendant Sowa infringed the patent. Sowa admitted the possible infringement

but denied that the patent was valid or enforceable. Sowa argued that the "Shahan" shackle construction is a combination patent comprised of features or elements recognizable in prior art and thus not subject to protection under a new patent. Sowa counterclaimed for unfair competition and antitrust violations.

A jury found specially that the subject matter of the "Shahan" patent would have been obvious to one of ordinary skill in the art at the time of the claimed invention. The jury concluded that AmHoist committed fraud on the Patent Office in obtaining the patent. I found sufficient evidence to support the jury's findings and accordingly, denied plaintiff's motion for judgment n.o.v. or for a new trial. I further

concluded that the degree of fraud was insufficient to support defendant's unfair competition and antitrust claims and therefore granted plaintiff's motion for summary judgment on these claims.

I ruled that the jury's finding of fraud on the Patent Office was sufficient grounds for finding this case to be "exceptional" for the purpose of an award of attorney's fees under 35 U.S.C. §285. Because §285 does not mandate an award of attorney's fees but leaves such a determination to the court's discretion, I made the further finding that such an award was appropriate here. However, I held that Sowa was entitled to such an award only for work on the patent claims and not on the counterclaims it pursued. The defendant was directed to segregate out those fees associated with nonpatent

claims and submit a complete accounting of its attorney's fees with supporting affidavits.

DISCUSSION

The court has discretion to determine the amount of reasonable attorney's fees. Manhart v. City of Los Angeles Dep't of Water and Power, 652 F.2d 904, 907 (9th Cir. 1981). The statute here is silent on what is "reasonable," but other courts in other types of cases have enumerated the factors which should be considered. The Ninth Circuit has adopted the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied sub nom, Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976). It is not necessary for the court to

address each factor specifically.

Rivera v. City of Riverside, 679

F.2d 795, 796-97 (9th Cir. 1982). But the court may abuse its discretion if it fails to at least consider the various factors and discuss the relevant ones.

Harmon v. San Diego County, 664 F.2d 770, 772 (9th Cir. 1981); O'Neil v. City of Lake Oswego, 642 F.2d 367, 370 (9th Cir. 1981).

In attorney's fee cases I consider the twelve Johnson factors, as well as a thirteenth -- the attorney's effort to bring the matter to a prompt and reasonable conclusion. Gibson v. Local 40, Civ. No. 68-614-PA (D. Or. May 12, 1981). In this case, as in most, certain factors are most relevant. I find that the time and labor reasonably necessary to successfully defend the patent claims was

from 500 to 800 hours. Appropriate use of paralegal time could have reduced the range to lower figures. This is a reasonable range based on observations during the trial, and a review of the deposition records and the Court's files. This range excludes the nonpatent claims. All the attorneys in the litigation were patent attorneys and the questions involved were neither particularly novel nor difficult. The case was entirely desirable from the standpoint of the defense counsel and did not preclude other employment. There were no significant time limitations imposed by the client or the circumstances. Counsel accepted this case on a fixed fee basis and there was not the risk associated with a contingent fee. The results obtained by defense counsel for their client were beneficial

and could not have been obtained without the litigation. Defense counsel has reasonable experience and ability in the field of patent law. This was counsel's first case for defendant.

Attorney's fee awards in this district since the time this litigation commenced until the present have varied from \$26.00 to \$100.00 per hour with the majority of awards falling in the range of \$50.00 to \$70.00 per hour.

Defense counsel has indicated that billing rates for the various attorneys involved in this case ranged from \$40.00 to \$125.00 per hour, and has requested for defense of the patent infringement claim an attorney's fee award of \$90,367.55, including \$1,760.00 for the work of a Rhode Island law firm in connection with the taking of a deposition.

Defense counsel further requests \$359.00 for preparation of the cost bill and \$1,393.50 for the time involved in seeking attorney's fees, but has segregated out \$15,784.15 for work involved in prosecuting the counterclaims.

I believe the amount requested is too high considering all relevant factors. I find that defendant's attorney is entitled to an award of attorney's fees in the amount of \$50,000.00.

The Clerk of the Court is hereby ORDERED to enter judgment for defendant, plus attorney's fees in the amount of \$50,000.00, and costs.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed.R.Civ.P. (52(a)).

DATED this 14 day of October, 1982.

/S/ Owen M. Panner
OWEN M. PANNER
United States District Judge

APPENDIX G

Judgment
dated October 19, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN HOIST & DERRICK)	
COMPANY,	)	Civil Action
	)	Plaintiff,
	)	File No.
	)	79-983-PA
v.)	
)	
SOWA & SONS, INC.,)	
)	
	)	Defendant.)

JUDGMENT

This action came on for trial before the Court and a jury, Honorable OWEN M. PANNER, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its special verdict,

It is Ordered and Adjudged that plaintiff shall recover nothing and that defendant Sowa & Sons, Inc. shall recover from plaintiff American Hoist & Derrick Company attorney's fees in the amount of \$50,000.00, with interest thereon at the

48a

rate of 10.41% from the date of entry
hereof, and its costs of action.

Dated at Portland, Oregon, this 19th
day of October, 1982.

/S/ Owen M. Panner
UNITED STATES DISTRICT JUDGE



APPENDIX H

Order of U.S. Court of Appeals for the
Federal Circuit denying Petition for
Rehearing dated February 15, 1984

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AMERICAN HOIST & DERRICK	)	No. 83-555
COMPANY,	)	83-564
Appellant/Cross-Appellee.))	
	)	Dist. Ct.
v.	)	No.
	)	CV 79-983 PA
SOWA & SONS, INC.,)	
Appellee/Cross-Appellant.))	

JUDGMENT

ON APPEAL from the U S District Court of Oregon

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Affirmed in part;
Reversed in part; Vacated in part; and
REMANDED, for a new trial with directions
that the trial be conducted in conform-
ance with attached opinion.

DATED January 12, 1984

ENTERED BY ORDER
OF THE COURT

Petition for Rehearing,
Denied, February 15,
1984, Suggestion for
Rehearing In Banc,
Declined, February 15,
1984.

George E.
Hutchinson,

/S/George E.
Hutchinson

Clerk

ISSUED AS A MANDATE: February 23, 1984

